INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL., PETITIONERS

v.

CALVERT DISTILLERS CORPORATION

No. 443

SCHWEGMANN BROTHERS, ET AL., PETITIONERS

v.

SEAGRAM DISTILLERS CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

These cases present the question of whether the nonsigner clause of a typical state "fair-trade" act conflicts with the Sherman Act, as amended by the Miller-Tydings Act. The Government is concerned that exemptions from the antitrust laws should be confined to the limits specified by Congress in enacting them. The decision below

permits imposition upon nonconsenting retailers of a resale price structure established by private persons without governmental supervision. The Government believes that such compulsory resale price maintenance is forbidden by the Sherman Act and is not exempted from that Act by the Miller-Tydings Amendment, which sanctions only "contracts or agreements."

STATEMENT

Petitioners are a partnership which operates a large retail store in New Orleans, Louisiana. Respondents are distributors of whiskey and gin products which bear the trade-marks or trade names of parent corporations of the respondents, or of affiliates of those parent corporations (Calvert R. 84; Seagram R. 80). Respondents do not sell direct to retailers, but sell through wholesalers. Respondents have entered "fair trade" contracts with a small number of retail dealers in Louisiana [1] under which the dealers agree to maintain the resale prices from time to time established by respondents on the products sold by them. Petitioners have not entered into any resale price maintenance contract or agreement applicable to the sale of respondents' products.

[1] Respondent Calvert alleged that it had 105, and respondent Seagram alleged that it had 106 such contracts with retailers in Louisiana (Calvert R. 8; Seagram R. 8). During the fiscal year ending June 30, 1950, some 6.165 dealers in Louisiana paid the federal occupation tax for resale of distilled spirits. Annual Report of Commissioner of Internal Revenue (1950), p. 152.

These actions were commenced by separate complaints filed by respondents in the United States District Court for the Eastern District of Louisiana on November 25, 1949 (Calvert R. 2; Seagram R. 2). Each complaint alleged that petitioners had sold, at retail to the consuming public, products bearing the trade names of the respective respondent at prices below the minimum retail prices set forth in a schedule of prices promulgated by it under contracts between it and various other retail liquor dealers in Louisiana obligating those dealers to charge the minimum prices specified by the respondent (Compl. pars. IX, X, Calvert R. 7-9; Compl. pars. IX, X, Seagram R. 7-9). Copies of the contracts were attached as exhibits to the complaints (Compl. Ex. A, Calvert R. 14; Compl. Ex. A, Seagram R. 14).

Each respondent alleged that the beverage products involved were purchased from and sold by it in interstate commerce, shipments being made from and title passing at a point outside Louisiana, and that all orders for merchandise by Louisiana customers were subject to acceptance by the respondent at its executive office in New York (Compl. par. IV, Calvert R. 4; Compl. par. IV, Seagram R. 4). Jurisdiction was claimed upon the basis of diversity of citizenship and an amount in controversy in excess of $3,000.00 (Compl. par. III, Calvert R. 3; Compl. par. III, Seagram R. 3). Respondents sought a preliminary injunction re-

straining sales below the prescribed minimum prices during the pendency of the action, and a like permanent injunction upon completion of final hearing (Compl., Calvert R. 12–13; Compl., Seagram R. 12–13).

Petitioners filed answers raising, *inter alia*, the defense that respondents' course of conduct in using contracts with Louisiana retailers as a basis for fixing the prices of noncontracting Louisiana retailers violates the Sherman Act as to sales affecting interstate commerce (Answer, First Defense, Calvert R. 19; Answer, First Defense, Seagram R. 19–20).

After hearing the district court issued preliminary injunctions (Calvert R. 80; Seagram R. 77). It also filed findings of fact and conclusions of law (Calvert R. 83; Seagram R. 79). With respect to petitioners' allegation of restraint of trade by respondents, the trial court ruled that no finding was necessary in view of the Miller-Tydings Act (Concl. 2, Calvert R. 90; Seagram R. 85).

Petitioners appealed. One of the grounds of appeal urged was that the trial court had erred in holding that the Miller-Tydings Act permits price fixing in an interstate transaction as to one not a party to a fair trade contract (Calvert R. 97; Seagram R. 91). The cases were consolidated for argument (Calvert R. 100; Seagram R. 94), and the court of appeals affirmed both judgments by a divided vote. A single set of opinions was filed in the two cases (Calvert R. 102; Seagram R. 96).

ARGUMENT

I

The "non-signer" clause of the Louisiana Fair Trade Act is invalid as applied to interstate commerce unless embraced within the exemption of the Miller-Tydings amendment to the Sherman Act

It has long been settled that the Sherman Act makes it unlawful to enter into any agreement, express or implied, limiting or fixing the price at which the purchaser of a commodity may resell.[3] The bar applies even as against rights asserted under copyright (*Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339; *Interstate Circuit* v. *United States,* 306 U. S. 208, 221) or patent (*Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 456–457; *United States* v. *Univis Lens Co.,* 316 U. S. 241, 250). The rule laid down by Congress thus covers the entire field of interstate and foreign commerce "except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 721. See *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S. 293, 296.

If the decision below remains unreversed, respondents will be able to impose a rigid price structure, not only upon retailers who consent to such an arrangement, but upon nonconsenters

[3] *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373; *Old Dearborn Co.* v. *Seagram Corp.,* 299 U. S. 183, 188–189; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 458; *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 721.

such as petitioners. By entering into a fair trade contract with a single retailer in a state, a manufacturer can compel compliance with the resale prices, which the manufacturer unilaterally establishes, by the thousands of retailers who have not consented to the arrangement.

If any principle under the Sherman Act can now be deemed established, it is that price fixing is unlawful *per se.*[3] Apart from the effect of the Miller-Tydings Act, it seems perfectly clear that the non-joiner provision of the state fair trade law is completely at war with the policy of the Sherman Act. "Under the Sherman Act 'competition not combination, should be the law of trade'." *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465. "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services * * *." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 493.

[3] *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; *United States* v. *Joint Traffic Association,* 171 U. S. 505; *United States* v. *Trenton Potteries,* 273 U. S. 392; *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U. S. 427; *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150; *United States* v. *Line Material Co.,* 333 U. S. 287; *United States* v. *Paramount Picture, Inc.,* 334 U. S. 131; *United States* v. *National Ass'n of Real Estate Boards,* 339 U. S. 485; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U. S. 211.

It may be argued that the only action complained of here is the action of the state in enacting the non-signer clause. That argument misconceives the issue. The state is not charged with violating the Sherman Act. The question is whether respondents may secure enforcement of a state law which purports to forbid price competition in an area where valid federal legislation has decreed its maintenance.[4] The problem is not one of application of the Sherman Act to a state, but of application of the Supremacy Clause of the Constitution to a state statute in a field of interstate commerce which Congress has occupied. This Court has said that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it * * *." *Parker* v. *Brown*, 317 U. S. 341, 351.[5] Here, Louisiana seeks to force adherence by all retailers to a price schedule promulgated by private persons. Apart from any exemptions created by the

[4] Even absent an express conflict, a state statute cannot survive which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67.

[5] Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 345–346: "No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce."

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Miller-Tydings Act, state law thus thwarts the rule laid down by Congress, since voluntary adherence to such price schedule with knowledge of like adherence by others would violate the Sherman Act. *Interstate Circuit* v. *United States*, 306 U. S. 208.

In *Parker* v. *Brown, supra,* the Court upheld as valid a raisin proration scheme operated by the state itself despite its restrictive impact upon competition in interstate commerce. But, in doing so, the Court was careful to distinguish the state program there involved from a scheme "intended to operate by force of individual agreement or combination" (317 U. S. at 350).[a] And the Court noted that, although the producers had a voice in the program,

> The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing

[a] In substance the state act provided a mechanism for a petition by producers for the establishment of a pro rata marketing plan, the holding of public hearings and making of findings by a state commission, *inter alia*, as to the reasonableness of the profits resulting from such a program, the formulation of the particular program under the supervision of the state commission, and approval of the program by it, and finally ratification of the state approved program by a certain percentage of the producers involved. 317 U. S. at 346–347.

> the conditions of its 'application.' [317 U. S. at 352.]

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 562, the Court took occasion to answer fears expressed in that case that application of the Sherman Act to insurance companies would necessarily invalidate state regulatory legislation in this field. The Court said:

> The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. Cf. *Parker* v. *Brown*, 317 U. S. 341, 350–352.

Thus the Court distinguished between regulatory legislation, such as that in *Parker* v. *Brown*, under which the state actively participates in the regulation, and legislation giving private interests *carte blanche* to fix prices. It plainly recognized that the latter type of legislation would contravene the Sherman Act.

If the nonsigner clause may validly be applied (apart from the Miller-Tydings Act) to interstate commerce, it would seem that the way is

[7] This Court recently observed that "Another element in the *Parker* case which led the Court to sustain the California regulation was that it was one which the policy of Congress was to aid and encourage, and the Secretary of Agriculture had approved the State program by loans." *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 537.

open for any state to nullify the Sherman Act as to interstate transactions occurring within its borders. Thus, for example, the proscription against monopolization contained in Section 2 of the Sherman Act could be rendered ineffective by a state law providing that only one interstate seller of a given commodity would be allowed to sell in the state. The nonsigner clause, unless exempted by the Miller-Tydings Act, is an equally clear-cut example of an attempt to validate by state action what would ordinarily be a violation of federal law. The state does not undertake to exercise supervisory power over the prices established under the fair-trade contracts. It simply says that those privately established prices shall be publicly enforced. *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, establishes the constitutionality of such legislation as applied to intrastate transactions, but as applied to interstate commerce, it is plainly in derogation of the Sherman Act.[8]

II

The exemption conferred by the Miller-Tydings Act does not embrace the nonsigner clause of the Louisiana Act

A. Statutory provisions

Section 1 of the Sherman Act 26 Stat. 209, as amended by the Miller-Tydings Act, 50 Stat. 693, 15 U. S. C. 1, provides in pertinent part as follows:

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[8] The *Old Dearborn* case itself recognizes that resale price maintenance in interstate commerce is unlawful under the Sherman Act (299 U. S. at 188).

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided, That nothing herein contained shall render illegal, contracts or agreements* prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when *contracts or agreements of that description* are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of *such contracts or agreements* shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful *any contract or agreement,* providing for the estab-

> lishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. * * * [Emphasis supplied.]

The Louisiana Fair Trade Act, Act 13 of 1936, La. Gen. Stat. §§ 9809.1–6, provides in pertinent part:

> SECTION 1. Be it enacted by the Legislature of Louisiana, That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.
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> Such provision in any contract shall be deemed to contain or imply conditions that such commodity may be resold without

reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract,* is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. [Emphasis supplied.]

It will be observed that the exemption created by the Miller-Tydings Act (embodied in the provisos of Section 1 of the Sherman Act, *supra*) is, on its face, much narrower than the statute which, respondents claim, has been totally exempted from the Sherman Act.[9] For present

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[9] The Louisiana statute is typical of that existing in 43 states. Report of the Federal Trade Commission on *Resale*

purposes the crucial difference between the Miller-Tydings exemptions and the state statute is that the non-signer provision of Section 2 of the state statute find, no counterpart in the federal Act. But since respondents contend that the Miller-Tydings Act is intended "to turn over to the state legislatures the handling of the whole problem of resale price maintenance on trade-marked commodities" (Br. in Opp. 10), it is appropriate to point out here that the federal exemption is narrower than the state statute in other respects as well. Thus it exempts only "contracts or agreements prescribing *minimum prices* for the resale" (emphasis supplied), while the state statute broadly exempts any provision that "the buyer will not resell such commodity except *at the price* stipulated by the vendor." [Emphasis supplied.] Hence, a maximum price resale provision would presumably be valid under the state law. But the fixing of maximum prices is violative of the Sherman Act (*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U. S. 211, and such price fixing would clearly not fall within the exemption of the Miller-Tydings Act unless the term "minimum" in that Act is to be read as including "maximum." [10]

Price Maintenance (1945), pp. 74–75; 2 C. C. H. Trade Reg. Serv., Pars. 7011, 7096, and 7503, *et seq.*

[10] Other differences between the two Acts may be briefly noted. Thus the second paragraph of Section 1 of the Louisiana Act makes lawful a contractual provision requiring the original vendee to require his vendee to agree to main-

With the exceptions mentioned above, the Miller-Tydings Act paraphrases almost exactly Section 1 of the state statute (see Pet. Br. 18).[11] Congress thus used language plucked from the state fair trade laws to exempt some of the activities validated as to intrastate sales by those statutes, and was silent as to other activities covered by them. In particular, the federal Act lacks any language sanctioning imposition of a rigid price maintenance structure upon non-consenting retailers. In other words, it has no non-signer provision. In these circumstances, it would seem that if respondents are to prevail they must establish either (1) that the nonsigner provision was omitted in the Miller-Tydings Act because it was surplusage in the state statute, *i. e.,* contracts under Section 1 of the state statute, standing alone, would be enforceable against strangers, or (2) that the Miller-Tydings Act was designed to include the nonsigner provision, that its omission was inadvertent, and that the omission should be judicially cured by reading the nonsigner provision into the Act.

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tain resale prices. There is no comparable provision in the Miller-Tydings Act. Again, the proviso in the Miller-Tydings Act eliminating from its coverage certain kinds of contracts is far broader than the exclusionary language in Sections 1 and 3 of the state Act.

[11] A typical state fair trade statute (Illinois Fair Trade Act) is discussed and reported in full in the report (H. Rep. 382, which accompanied H. R. 1611, 75th Cong., 1st Sess.).

The first of these alternatives is absurd on its face. Section 1 of the state statute is negative in form. It provides, with qualifications not material here, that a contract fixing resale prices of commodities shall not be deemed illegal. Such a provision could hardly be stretched by construction to operate as an affirmative requirement that complete strangers to the contract must comply with it. See dissenting opinion below (Calvert R. 110–111). The second alternative is no more persuasive. Since the Miller-Tydings Act, as far as it goes, is a paraphrase of Section 1 of the state Acts (*supra*, p. 15), the inference is inescapable that the omission of a vital provision contained in a different section of those Acts was intentional. It is inconceivable that the nonsigner provision could have been inadvertently overlooked in view of the brevity of the state statutes and of the admitted importance of the non-signer provision in the "fair trade" scheme (see Br. in Opp. 5–6). In a statute which otherwise shows the marks of careful drafting, an intention to validate non-signer clauses cannot be reconciled with a complete failure to mention them.

Respondents suggest (Br. in Opp. 5–6) that the non-signer clause is indispensable to effective price maintenance, and that the purposes of the Miller-Tydings Act will be frustrated unless that clause is given full effect. This view must rest on the premise that manufacturers are unwilling

or unable to restrict the sales of their product to wholesalers and, through them, to retailers who will voluntarily accept "fair trade" contracts because so many retailers are unwilling to enter fair trade contracts voluntarily, with the result that a resale price structure cannot be maintained without compulsion. Even if this were true, it would not follow that Congress in enacting the Miller-Tydings Act contemplated or desired the establishment of resale maintenance which could be accomplished only by legislative fiat as distinguished from consensual arrangement. The Act sanctions only "contracts or agreements." It is obvious that the non-signer clause, which imposes resale price maintenance upon all retailers if a *single retailer in a state* agrees to a fair trade contract, is aimed at price fixing by compulsion, not price fixing by agreement.

It may freely be conceded that the non-signer clause makes resale price maintenance much easier, but it does not follow that there can be no resale price maintenance without it. The manufacturer controls his product at the source and presumably can refuse to sell it to customers unwilling to enter fair trade contracts. It is true that there may be business reasons why a manufacturer may not wish to insist upon such a condition in all of his contracts. But Congress, in using the term "contracts or agreements," obviously limited resale price maintenance to those areas in which such agreements are obtain-

able. Had Congress desired to eliminate the trouble and inconvenience of securing consent to fair trade agreements, it would no doubt have simply authorized resale price fixing by the manufacturer of any commodity sold by him bearing a trademark or trade name.

The position of the Government, simply stated, is that the Miller-Tydings Act means neither more nor less than what it says.[11a] By its terms, the Act removes the bar of the Sherman Act as to the specified voluntary contracts or agreements and does nothing more. A state statute providing that strangers to a resale price maintenance contract—comprising almost all the retailers in a state—are to be bound by its terms if one or a few retailers can be induced to accept it, goes far beyond the approval of voluntary arrangements; it establishes a system of private price fixing backed by the coercive authority of the state. It is not within the *terms* of the Miller-Tydings Act, and, we submit, is not to be read into the Act upon the basis that it is within the *purposes* of the Act.

B. Legislative history

Both the majority and the dissenter below regarded reference to the legislative history of

[11a] See *62 Cases, More or Less* v. *United States*, decided March 26, 1951, No. 363, this Term, 19 Law Week 4187, 4188, where the Court stated "our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

the Miller-Tydings Act as unnecessary to decision of this case. In the particular circumstances there is much to be said for that view. It is hard to conceive of any evidence of intentions of the proponents of the legislation which would be strong enough to justify judicial addition of a non-signer clause exemption where it must have been deliberately omitted by Congress. Assuming, *arguendo,* that the purpose of the sponsors of the Miller-Tydings Act was to give the states *carte blanche* in the price maintenance field, or even specifically to validate existing state "fair trade" legislation as applied to interstate commerce,[12] it is obvious that the statute Congress enacted stopped short of achieving such a result. There may be, and often is, a disparity between the hopes of the sponsors of legislation and the statute finally enacted. *United States* v. *New York Central R. Co.,* 263 U. S. 603, 610.

In fact, the legislative history does not reflect any clear-cut intention to relinquish to the states unrestricted authority in this field. As the review which follows indicates, the most that can be urged from the legislative history of the Miller-Tydings Act is that some members of Congress thought that the bill would validate state fair trade legislation generally, or that nonsigner

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[12] See, *e. g., Pepsodent Co.* v. *Krauss Co.,* 56 F. Supp. 922, 927 (E. D. La.) where it was stated that the Act's purpose was to "remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

clauses would be validated, and some opponents of the legislation feared that its enactment would validate the nonsigner provisions. On the other hand, there are numerous expressions of the opinion that the only effect of the Act would be to validate voluntary contracts.

The earlier legislative history has been rather extensively reviewed in the brief for petitioners (Appendix E. Pet. Br. 66–74). That review indicates that in general the state fair-trade acts were closely patterned after unsuccessful bills introduced in earlier Congresses, but that the nonsigner clause of the state fair-trade acts was an innovation which first appeared as an amendment to the California act in 1933, and was not based on any of the prior federal bills. On the other hand, the early abortive federal bills which contained no nonsigner clause were in substance carried over into the Miller-Tydings Act without the addition of any provision purporting to relate to nonsigners, such as the states had in time adopted.

The Miller-Tydings bill originated in the Seventy-Fourth Congress, where it passed the Senate (80 Cong. Rec. 8433) but was not reported out of committee in the House. In the Seventy-Fifth Congress similar bills (S. 100, 81 Cong. Rec. 66; H. R. 1611, 81 Cong. Rec. 34) were reported out by the judiciary committees of both houses (S. Rep. 257; H. Rep. 382; 75th

Cong., 1st sess.) but were not debated or acted upon. Instead the bill was attached by the Senate Committee on the District of Columbia as a rider to the District of Columbia revenue bill (H. R. 7472, S. Rep. 879, 75th Cong., 1st Sess.). In this form it was debated and passed by the Senate (81 Cong. Rec. 8137–43, 8166–68).

The pertinent committee reports, which are generally the most important portions of the legislative history of a bill, are Senate report in the Seventy-Fourth Congress (S. Rep. 2053), the Senate report in the Seventy-Fifth Congress (S. Rep. 257), which incorporated Report 2053, the Senate report on the District of Columbia revenue bill (S. Rep. 879), which merely quoted the prior reports, and the House report on H. R. 1611 (H. Rep. 382, 75th Cong., 1st sess.). The Senate majority reports make no mention of the nonsigner provision in the state laws or of the effect of the proposed bill upon persons not parties to the contracts or agreements. The state laws to be validated were referred to as not being "general price-fixing acts" but as merely "legalizing * * * contracts," as being "merely permissive." S. Rep. 2053, p. 2. This report declared:

> S. 3822 removes the doubt as to the applicability of the Sherman Act by expressly legalizing *such contracts* where legal under the laws of the State where made or where they are to be performed.
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> * * * * *

> The State acts are *in no sense general price-fixing acts;* they merely authorize a manufacturer or producer to enter into *contracts* for the maintenance of his price, but they do not compel him to do so. In other words, *they are merely permissive.* [Emphasis supplied.]
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> * * * * *
>
> But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.
>
> In other words, the bill does no more than to remove Federal obstacles *to the enforcement of contracts* which the States themselves have declared lawful. [Emphasis supplied.]

The only reference in the Senate reports to the non-signer clause was contained in the minority views of Senator King, an opponent of the bill, who indicated that he thought that the bill would validate them. S. Rep. 879, Part 2, p. 6. Senator King's statement quotes a letter from the President, enclosing a letter to him from the Chairman of the Federal Trade Commission, sent to the Senate in opposition to S. 100. 81 Cong. Rec. 3838, S. Doc. 58, 75th Cong., 1st Sess.; Pet. Br. 82, n. 74. The Federal Trade Commission letter expresses the belief, or the fear, that the Miller-Tydings Act would allow the enforcement of non-signer clauses in state acts.

The House report on H. R. 1611 (H. Rep. 382, 75th Cong., 1st Sess., p. 2) was in general also phrased in terms of legalizing contracts. It said in its "General Statement" (p. 2):

> The sole objective of this proposed legislation is to permit the public policy of States having "fair trade acts" to operate with respect to interstate contracts for the resale of goods within those States. The fair-trade acts referred to legalize the maintenance, *by contract,* of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class. [Emphasis supplied.]

And in the succeeding paragraph, the effect of the reported bill is stated to be to legalize "contracts prescribing minimum prices or other conditions for resale" of goods under certain conditions. *Ibid.*[13] This report, however, in describing the state laws did advert to the nonsigner provision,[14] and also quoted the Illinois Act in full.

These committee reports, though revealing some awareness of the nonsigner clauses in state

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[13] The additional views of Representative Celler, who did not oppose the bill, also fail to discuss the present question. Representative Celler apparently feared that the "other conditions", permitted in that version of the bill, might legalize tying arrangements. *Id.*, p. 6. He was aware that many state acts contained nonsigner clauses, and that their constitutional validity had been sustained in the *Old Dearborn* case, *supra*, H. Rep. 382, 75th Cong., 1st Sess., p. 24.

[14] The House report noted that under state fair trade laws "third parties with notice are bound by the terms of such a contract" (p. 2).

laws, fail to show any congressional intention that the federal statute should exempt state non-signer clauses from the provisions of the Sherman Act. The repeatedly stated purpose of the federal legislation was to legalize, to permit the enforcement of, contracts. Certainly the reports do not manifest any intention to permit a manufacturer to fix prices, for persons who had not signed contracts, in a clear enough manner to put Congress on notice that the proposed bill was to go a great deal further in that direction than anyone could gather from its language.

The debate on the floor of Congress is not dissimilar, except for a single statement by Representative McLaughlin noted below. The first discussion in the Senate of S. 3822 was a statement by Senator Tydings, in response to a request for an explanation by Senator McKellar (80 Cong. Rec. 8433). Senator Tydings mentioned that twelve states have passed—

> acts within their States regulating loss-leader selling and the making of contracts between a manufacturer and a distributor of an article * * * [S. 3822] simply backs up the action of those States * * *.

In the debate in the succeeding session, referring to the amendment to H. R. 7472, Senator Tydings made the following statement (81 Cong. Rec. 7495):

> What does the amendment do? It permits a man who manufactures an article

> to state the minimum resale price of the article in a contract with the man who buys it for ultimate resale to the public, provided * * *.[15]

At no time did Senator Tydings mention the nonsigner clause or its effect upon persons not parties to the contracts. His statements as a whole would certainly leave the impression that he was referring only to voluntary agreements.

Senator King, opposing the bill, repeated the substance of his minority committee report which indicated his awareness that several state price-maintenance laws contained nonsigner clauses, and expressed his opinion, or fear, that the Miller-Tydings Act would permit price fixing in those states.[16] He again quoted the letter from

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[15] Insofar as it reflects Senator Tydings' attitude toward the proposed legislation as permitting price fixing by statute, the following statement is material (81 Cong. Rec. 7496): "I have never voted for a price-fixing bill in my life so far as I can recall."

[16] Senator King said (81 Cong. Rec. 7491): "If the rider [the Miller-Tydings Act] is adopted and becomes law, it will permit manufacturers and distributors in New York, for instance, to enter into contracts with retailers in California, and fix and maintain retail prices, though monopolies in the commodities referred to might result. And I might add that in California and other States it has been held that if the retail vendee gives notice to the public of his price-fixing contract with the distributor or manufacturer in New York no other person in the State may sell the commodity at a price below that fixed in such contract."

These decisions, of course, did not apply to the validity of nonsigner clauses with reference to interstate commerce.

the Chairman of the Federal Trade Commission, referred to above.

Perhaps the most apt characterization of the Senate debate was Senator Vandenberg's statement (made generally and not in connection with the point here at issue) (*id.* at 7492): "Regardless of the merits of this amendment, it is perfectly obvious that not 5 percent of the membership of the Senate will know anything whatever about the amendment when the Senate votes upon it."

The House debates upon H. R. 7472 are scarcely more conclusive. Representative Culkin, who favored the amendment, commented that its effect would be to "make legal what was condemned by the Supreme Court in 1910 in the case of *Dr. Miles Medicine* [sic] *Co.* v. *Parks* [sic] *& Sons Co.* (220 U. S. Rep. 373) * * * such price-fixing acts supplemented by this legislation will write into law the minority opinion of Mr. Justice Holmes * * *." 81 Cong. Rec. 8139–8140. The *Dr. Miles Medical* case arose long before the general enactment of "fair trade" acts, and was decided twenty-three years before California enacted the first nonsigner clause. If, as Representative Culkin said, the purpose of the Miller-Tydings Act was to overturn this decision, the Act would have no relation to nonsigner clauses.

One member of the House, Representative McLaughlin, a member of the Judiciary Com-

mittee which had reported H. R. 1611, clearly expressed the opinion that the Act would authorize the enforcement of nonsigner clauses with respect to interstate commerce. 81 Cong. Rec. 8140–8141, 8142, quoted in full Pet. Br. 91, n. 98. In the course of his statement, however, he also made remarks as to the voluntary nature of the arrangement being authorized which are not consistent with the interpretation of the bill as validating the nonsigner clauses. Thus he said (81 Cong. Rec. 8141):

> H. R. 1611 is in no sense a price-fixing statute * * *. It is entirely a permissive act. It merely allows the seller and buyer * * * to contract for resale of goods according to the State law, if they want to do so. It does not compel the buyer and seller to enter into the contract but only authorizes them to do so if they so desire.

Despite the one clear statement by Representative McLaughlin, the debate as a whole does not manifest any uniform understanding of the problem on the part of the House sufficient to warrant giving the Act a construction plainly at variance with what it says.

Our search of legislative history has discovered no other comments on the question at issue in this case. Given their greatest weight, the few references to the nonsigner clause would hardly be enough to support construing the statute as applicable to subjects other than those mentioned

in the law itself. The Miller-Tydings Act provides merely that the antitrust law shall not render illegal "contracts or agreements prescribing minimum prices," etc., when such "contracts or agreements" are lawful under state law. Nothing in the history of the Act justifies a distortion of this plain language so as to immunize not only the "contracts or agreements" themselves but also a mandatory requirement of state law that persons not parties to such agreements, who could not be persuaded to sign them voluntarily, must nevertheless comply with any agreement made with any other person in the state.

CONCLUSION

For the foregoing reasons, the nonsigner clause of the Louisiana Fair Trade Act is in conflict with the Sherman Act and is not validated by the Miller-Tydings Act. The judgments should be reversed.

Respectfully submitted.

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